No. [illegible] 246

Supreme Court of the United States.

CHARLES H. SHAW, Trustee; THE UNION LIGHT, HEAT & POWER COMPANY, and THE SUBURBAN ELECTRIC COMPANY,

Appellants,

versus

CITY OF COVINGTON et al,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Brief for Appellants.

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CHARLES H. SHAW, Trustee; THE UNION LIGHT, HEAT & POWER COMPANY, and THE SUBURBAN ELECTRIC COMPANY,

Appellants,

No. 649. *vs.*

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Brief for Appellants.

This is an appeal from the decree of the Circuit Court of the United States for the Eastern District of Kentucky in an action in which the appellants were complainants and the appellees were defendants, and in which the court dismissed the bill and denied the relief sought.

The action was brought in the Circuit Court by Charles H. Shaw, Trustee in Bankruptcy of The Suburban Electric Company, claiming the ownership of an exclusive electric light franchise in the City of Covington, Kentucky, to enjoin said city from constructing a municipal lighting plant. The ground

upon which the injunction was sought, was that the construction and operation of such a plant would be a violation of the exclusive franchise aforesaid, and, therefore, an impairment of the obligations of a contract in contravention of Article I, Section 10 of the Constitution of the United States.

STATEMENT OF FACTS.

On April 22, 1882, the General Assembly of the State of Kentucky passed an act giving to the Covington Electric Light Company an exclusive franchise to furnish electric light to the City of Covington and its inhabitants for a period of twenty-five years. That act and two amendments thereto are hereto attached, marked Appendix A.

The company was promptly organized; officers were elected and regular meetings were held every year up to the year 1891, when the company commenced to furnish electric light in the City of Covington.

On October 5, 1882, the City of Covington passed an ordinance entitled "An ordinance to enable the Covington Electric Light Company to exercise the franchises granted by the act of the General Assembly of Kentucky." This ordinance is set out in full as Appendix B of this brief.

On June 21, 1883, the ordinance last referred to was repealed by an ordinance entitled as follows: "An Ordinance prescribing the terms upon which streets, alleys, avenues and public grounds of the City of Covington, Kentucky, may be used by incorporated companies, firms or individuals engaged in the business of furnishing light by means of electricity." This ordinance purported to state the terms upon which any company, firm or individual could acquire a franchise in the City of Covington, and to enumerate the steps which must be taken by any company, firm or individual which sought a franchise *under the terms of that ordinance*. This ordinance is attached hereto in full, marked Appendix C.

On July 3, 1884, an ordinance was passed by the Common Council of Covington amending the ordinance last named. A copy of the amending ordinance is hereto attached, marked Appendix D. It does not contain any provisions which bear directly upon the points in controversy in this contention.

Some time between the years 1885 and 1890 a company had been organized, either as a corporation or a partnership, to carry on an electric lighting business in the City of Covington, and without any direct authority either from the city or state had erected poles, strung wires, and constructed an electric plant. This company had developed a considerable business in the latter part of the year 1890, and in January, 1891, the Covington Electric Company acquired the plant and assets of this company, and with its poles, wires and plant commenced an electric lighting business in the City of Covington. It notified the city council of Covington that it had made said purchase, and requested council to authorize the transfer to the Covington Electric Light Company of all the franchises of the other company. Thereupon council responded that the other company had never acquired a franchise and that there was nothing to transfer. The Covington Electric Light Company, finding there was no franchise belonging to the other company, accepted the situation and proceeded to act under its own franchise. It immediately commenced the transaction of a considerable business in the City of Covington in the month of January, 1891, and from month to month and from year to year thereafter increased its business, adding largely to its plant, the length of its lines, the amount of light furnished and the investment involved.

On April 11, 1894, the Covington Electric Light Company, the Citizens Electric Light Company, of Dayton, Kentucky, and the Suburban Electric Illuminating, Heating and Power Company of Newport, Kentucky, consolidated under the provisions of Section 555 *et seq.* of the Revised Statutes of Kentucky, under the name of the Suburban Electric Company. This consolidation carried to the new company the exclusive franchise of the Covington Electric Light Company, and the new company carried on in Covington, up to the time of the bringing of this suit, the business of public and private electric lighting, steadily increasing its plant and its investment in the City of Covington.

In the year 1897, the City of Covington had under consideration a contract with the Suburban Electric Company by which the latter company was to light the streets, alleys and public places of the City of Covington. The city council as a preliminary step to entering into this contract decided to inves-

tigate the validity of the Suburban Electric Company's franchise in the City of Covington, and referred the matter to a committee and to the city solicitor. That committee and the city solicitor reported that the Covington Electric Company had received a valid franchise in 1882, had commenced to operate under it prior to the consolidation, and that the Suburban Electric Company had at that time, in 1897, all of the franchise rights of the Covington Electric Company as given to it by its legislative charter. This report was concurred in unanimously by the city council and upon the basis of this report a contract was entered into between the City of Covington and the Surburban Electric Company. A copy of the report of the committee is hereto attached, marked Appendix E. The contractual relation thus established has continued until the present day. During all of that time the City of Covington has been supplied with light for its public streets and has paid for same. The company has regularly paid franchise taxes to the City of Covington upon its franchise.

At the time of the filing of this suit, the Suburban Electric Company had gone into bankruptcy, but after the filing of the suit the bankruptcy proceedings were terminated and the company restored to its property and franchises. It thereupon conveyed this franchise to the Union Light, Heat & Power Company, which was then made a party complainant herein by bill in the nature of supplemental bill.

Some questions having been made upon argument in this case in the court below as to the assignability of this franchise by the Suburban Electric Company, that company was made a party complainant hereto, and filed its bill in the nature of a supplemental bill, as appears of record herein, page 82.

This bill was filed upon the motion of the Suburban Electric Company, and by order of Court, all of which was done before the decree was entered in the case. No answer was ever filed to the supplemental bill.

Some time in the year 1900, the City of Covington conceived the idea of building a municipal lighting plant, and proceeded to authorize the issue of bonds for that purpose. The complainant herein, claiming that such an action upon the part of the City of Covington would be a violation of its exclusive fran-

chise, filed its bill to enjoin such action on the part of the City of Covington.

QUESTIONS INVOLVED.

It is not denied by the city that under the terms of our charter we were given an exclusive franchise in the City of Covington to furnish light to the city and its inhabitants, and that the present attempt upon the part of the City of Covington to erect and operate its own lighting plant is in violation of the terms of our exclusive franchise.

The grounds upon which the city denies our right to the relief sought are as follows:

I. That we were guilty of a non-user for a period of five years, and therefore lost our franchise.

Our answer to this is that if there was a non-user within the meaning of our charter, it did not work an automatic forfeiture; that, at best, it was merely a ground of forfeiture; that the State was the only party that could have taken advantage of it, and not having done so, no forfeiture ever occurred.

II. That the company failed to give a bond required by the ordinance of June 21, 1883.

Our answer to this is that the ordinance in question did not apply to our company; furthermore, that even if it had applied to our company, the failure of the company to give the bond would not be even a ground of forfeiture, much less the foundation for the claim that our franchise had been destroyed.

III. That by the consolidation of the Covington Electric Light Company with the other companies under the name of the Suburban Electric Company it lost its exclusive franchise.

Our answer to this is that the statute specifically provides that in the event of such a consolidation, the new company shall become the owner of all the rights and franchises of the constituent companies.

IV. That our franchise was repealed by the passage of the Covington City Charter.

Our answer to this is that the Covington City Charter did not purport to repeal any provision of the franchise in question. It simply authorized the Covington Council "to provide by themselves, or through others, for lighting the streets, etc., and to furnish light to the inhabitants."

V. That our exclusive franchise was repealed by Section 573 of the Revised Statutes of Kentucky, which provides for the repeal as of September, 1897, of all special charters inconsistent with the chapter of which said section is a part.

Our answer to this contention is that there is nothing in our charter which is inconsistent with that chapter; that the provisions of the Constitution and statutes indicate clearly that Section 573 was not intended to destroy an exclusive franchise which, in consideration of public service and the performance of a public duty delegated by the State, had been lawfully granted to and enjoyed by a private corporation. Furthermore, that the General Assembly was without power to destroy such franchise even if it had so intended.

VI. That the exclusive franchise in question was not assignable by the Suburban Electric Company to the Union Light, Heat & Power Company.

Our answer to this is that, under the terms of the franchise and the law of Kentucky, it was assignable, but that the question is immaterial because the Suburban Electric Company is itself a party complainant.

The mere statement of this fact will render unnecessary any discussion of the assignability of the franchise in question.

The opinion is to be found at length on pages 42, *et seq.*, of the printed record.

The court below decided the first, second and fourth points in our favor, holding that we had acquired a valid exclusive franchise which was not forfeited by a non-user, or by a failure to give bond to the City of Covington, as stated, and that it was not repealed by the passage of the Covington City Charter.

ERRORS ASSIGNED.

The court held with the city, however, on the third and fifth points, and decided that the exclusive franchise was lost in the consolidation of the Suburban Electric Company with the other companies, and that irrespective of that, it was repealed as of September 28th, 1897, by Section 573 of the Revised Statutes of Kentucky.

ARGUMENT.

Before proceeding to the discussion of these questions, as above stated, we desire to advance the following propositions relative to the nature of the franchise in question.

Complainants' franchise is from the State of Kentucky and not from the municipality and was valid when granted.

It was proper for the State to grant to a private corporation the exclusive right to furnish electric light for public and private consumption in the City of Covington. Such a grant is not a violation of any provision of the Constitution of Kentucky as it then existed, or as it now exists. Such grants have always been regarded as legal and as proper. In the case of

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S., 650,

the complainant company had an exclusive franchise to furnish gas to the City of New Orleans. This franchise was attacked, and this court in deciding the case held as follows:

> Syl.: "A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the State, in consideration of the performance of a public service, and, after performance by the grantee is a contract protected by the Constitution of the United States against State legislation to impair it."

Mr. Justice Harlan, speaking for this court at page 665, says:

> "If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation by granting exemption from taxation to particular individuals and corporations; it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration

> of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies."

See also to the same effect, the case of

New Orleans Water Works Co. v. *Rivers*, 115 U. S., 674.

In the case of

Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S., 683,

this court again lays down the rule stated in the New Orleans case above quoted, and also makes this additional ruling upon the general subject (see Syllabus, p. 683):

> "A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants by means of pipes and mains laid through the public streets, and upon condition of the performance of the service by the grantee, is no infringement of that clause in the Bill of Rights of Kentucky, which declares 'that all freemen, when they form a special compact, are equal and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services.'"

The cases above cited are conclusive, we think, upon the validity of an exclusive franchise of this character.

We desire to further impress upon the court that this franchise was given directly by the State of Kentucky, and not by the City of Covington. The State of Kentucky had the power to grant the franchise, and did grant it to the Covington Electric Light Company; and the City of Covington had no further control over, or connection with, the franchise than was expressly given it in the charter of the company. We state this proposition at this time, so that, in considering the various points in this case, it shall not be confused with that class of cases in which the franchise proceeds directly from a municipality and remains directly under its control. Under such a franchise as the one now in question, the only power which the city has is to impose certain regulations as to the

manner of laying pipes, erecting poles, stringing wires, etc. It can not augment or diminish in any respect the franchise itself. See

Chicago City Ry. Co. v. *People,* 73 Ills., 541.

In the case of *Africa* v. *The Mayor, etc.,* 70 Fed., 729, p. 733, the court says:

> "It is to be borne in mind that plaintiff's franchise to operate his railroad is not derived from the municipal corporation, but from the Legislature itself, and it is none the less so because obtained under a general incorporation act, instead of a special statute, which is no longer constitutionally possible. * * *
>
> "The only authority delegated to the city in the completion of the franchise rights, is the power to give its consent and to prescribe the terms and conditions on which the streets are to be used. * * *
>
> "The statute does not reserve to the city council the right to repeal. So far as such right is reserved at all, it is reserved to the Legislature itself. The statute does not vest the city with any power whatever to grant or repeal a grant. Its power over the subject ends when it gives its consent and prescribes the conditions in an ordinance for that purpose. Whether the city council might withhold its consent altogether in the first instance is a point upon which the cases are not agreed and is not necessary to be considered here. When it has given its consent it has excepted and exhausted its power, so far as the right to use the streets is concerned."

THE COURT BELOW HAD JURISDICTION TO ENTERTAIN THIS ACTION.

This is a case arising under the Constitution of the United States, particularly that clause thereof which forbids the enactment of laws impairing the obligation of contracts.

That such an exclusive privilege is a contract coming under the protection of the Constitution of the United States, has been definitely settled in three cases heretofore referred to, viz.:

Louisville Gas Company v. *Citizens' Gas Company,* 115 U. S., 683.

New Orleans Gas Company v. *Louisiana Light Company,* 115 U. S., 650.

New Orleans Water Works Company v. *Rivers,* 115 U. S., 674.

While it is true that in the case at bar we are not attacking any action by the State of Kentucky itself, nevertheless the proposed action of the City of Covington is based upon a supposed right given by the act of the General Assembly, known as the Covington City Charter; and the clause of the United States Constitution heretofore referred to applies equally to the acts of the state or acts by municipalities under the cover of authority of state laws. The principle is thoroughly recognized in the case of *The City Railway Company* v. *The Citizens' Railroad Company*, 166 U. S., 657. The court says, on pages 563 and 564:

> "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair. Conceding that the Legislature of the state alone had the right to make such grant, it may, as was observed in *Wright* v. *Nagle*, 101 U. S., 791, 794, 'exercise its authority by direct legislation, or through agencies duly established, having power for that purpose. The grant, when made, binds the public, and is directly or indirectly the act of the state. The easement is a legislative grant, whether made directly by the Legislature itself or by any one of its properly constituted instrumentalities.' 'The complainants claim,' as in the case under consideration, 'they have such a grant through the agency of the inferior court, acting under the authority of the Legislature.' See, also, *Saginaw Gas Light Co.* v. *Saginaw City*, 28 Fed. Rep., 529; *Weston* v. *Charleston*, 2 Pet., 462; *New Orleans Water Works Company* v. *Rivers*, 115 U. S., 674.
>
> "That the complainant had a contract with the city is entirely clear. It was so held by the Supreme Court of Indiana in the *Western Paving & Supply Company* v. *Citizens' Street Railroad Company*, 128 Indiana, 525, in which the liability of the company for certain street improvements was discussed and passed upon. It is true that, by Section 11 of the original act of 1861, a right was reserved to the general assembly to amend or repeal at their discretion the act authorizing the incorporation of street railway companies; but that was a right reserved to the general assembly itself and was never delegated, if in fact it could be delegated, to the common council of the city.
>
> "That the city did attempt to impair this contract by the agreement of April 24, 1893, with the City Railway Company, and its ordinance ratifying the same,

is equally clear. This contract was entered into in pursuance of a supposed right given by the act of the General Assembly of March 6, 1891, known as the city charter, the fifty-ninth section of which was enacted that 'the board of public works shall have power * * * to authorize and empower by contract, telephone, telegraph, electric light, gas, water, steam, or street car or railroad companies to use any street, alley or other public place in such city: * * * provided, that such contracts shall, in all cases, be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect.' This contract and ordinance of April 24, 1893, even if otherwise valid, could not be construed to interfere with the rights of the complainant to occupy the streets of the city under the act of 1861, and the ordinance of January 18, 1864, without coming in conflict with that provision of the Constitution which forbids states from enacting laws impairing the obligation of contracts. Whether the state had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S., 79, 88."

A very full and strong decision to the same effect is that of Judge Taft, speaking for the Circuit Court of Appeals of this circuit, in the case of *The Iron Mountain R. Co. of Memphis* v. *City of Memphis et al.*, 96 Federal, 113, to which the court's attention is invited.

We now proceed to the argument of the questions involved herein, as heretofore enumerated:

I.

The franchise was not forfeited by reason of the non-user for a period of five years.

The evidence shows that the Covington Electric Light Company promptly organized after its charter was granted in 1882, and maintained an organization, with officers, directors and regular meetings, from the time of the incorporation until its consolidation with the other companies in the Suburban Electric Company.

The language of the charter upon which the defendant relies in its claim that our charter has been forfeited is as follows:

> "But a non-user of the privilege of this act of incorporation for a period of five years shall work a forfeiture."

We claim, in the first place, that the forfeiture referred to related not merely to the franchise upon the streets of Covington, but also to the right to exist as a corporation; in other words, that it covered the entire grant made by the charter. This being true, the non-user which was to work a forfeiture must have been equally extensive, and must have related to all the things to be done by the company under its charter. If, therefore, the company did anything under its charter within five years, such as a *bona fidē* organization, an election of directors and officers—all of which it did—this would save it from the guilt or the penalty of the non-user referred to.

In the second place, even if the forfeiture and the non-user referred only to the exclusive privilege of furnishing electric light to the City of Covington and its inhabitants, nevertheless the failure of the company to commence furnishing light within the five years did not of itself produce an automatic forfeiture. Such non-user would at best be a mere ground of forfeiture to be asserted by the state in a direct proceeding, and this not having been done, the forfeiture is waived and the franchise is in full force and effect.

In the third place, grounds of forfeiture or any violation of our duties under the charter can not be asserted collaterally or incidentally in a proceeding of this character. The only competent evidence in an action of this sort is the judgment of a court in a direct proceeding by the state against our company, declaring the forfeiture of our franchise. No such action having been taken, and no such judgment having been entered, the city can not rely upon any alleged violations of our charter as grounds of forfeiture.

We will argue these propositions in the inverse order stated.

(a). Non-user can not be set up collaterally or incidentally as in this case.

The law on this subject is very clearly stated in Angell and Ames on Corporations, Section 777, to be as follows:

"A cause of forfeiture can not be taken advantage of or enforced against a corporation collaterally or incidentally or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone institute such a proceeding, since it may waive a broken condition and a compact made with it as well as an individual."

In the treatise of Clark and Marshall on Private Corporations, Vol. 2, Section 313*a*, the principle is again stated in another form:

"When it is said that a corporation may forfeit its charter by mis-user or non-user of its franchise, it is not meant that the mis-user or non-user results *ipso facto* in its dissolution. On the contrary, as a general rule, however long a corporation may fail to exercise the powers conferred upon it, or however much it may abuse them, a forfeiture of its charter can only take effect upon a judgment of a competent tribunal in judicial proceedings instituted by authority of the state. The state may waive the forfeiture, and until it institutes proceedings to have a forfeiture judicially determined and declared, and a judgment or decree of forfeiture is rendered, the existence of the corporation continues for all purposes just as if there had been no mis-user or non-user; and the forfeiture can not be set up collaterally by private individuals or other corporations, or even by the state for the purpose of attacking the right of the corporation to exercise the powers and franchises conferred upon it by its franchise."

This principle is so fortified by uniform authority, that it would seem unnecessary to either argue it at length, or cite authorities, save and except to remind the court of the opinion of Mr. Justice Nelson in the case of *Frost et al* v. *The Frostburg Coal Company*, 24 Howard, p. 278, on p. 283:

"The ninth section of the charter provides that the corporation shall be subject to all the restrictions imposed by the general act of 1838, regulating incorporations for manufacturing and mining companies. The fifteenth section of this act provides, that when over four-fifths of the capital stock of the company to which the act applies shall become concentrated, by purchase

or otherwise, in the hands of less than five persons, etc., all the corporate powers and privileges granted shall cease and determine. And it is insisted, that the stock of this company, at the time of its organization was held in violation of this section of the general act. Although the ninth section of the charter subjected the company to the general act, yet the provision is to be construed as subject only, when not inconsistent with the express provisions of the charter; and in this view, the better opinion, we think, is, that this four-fifths provision does not apply. But whether it does or not, it is unimportant to determine; for conceding that it does, a private party can not take advantage of the forfeiture. That is a question for the sovereign powers, which may waive it, or enforce it, at its pleasure. (9 Wend. 382; 4 Denio, 397)."

(b). Non-user for five years did not automatically produce a forfeiture without proceedings for that purpose.

As we have seen, the language of our charter is as follows:

> "But a non-user of the privilege of this act of incorporation for a period of five years shall work a forfeiture."

It can not be claimed that, under the language above set forth, the failure of the Covington Electric Light Company to erect poles and string wires for a period of five years resulted *ipso facto* in the forfeiture of its franchise without any judicial proceedings.

The Legislature may, in granting a franchise provide that it shall cease to exist if the grantee shall fail to comply with the prescribed condition, but to make such a failure result *ipso facto* in a forfeiture, the act must clearly show such an intention on the part of the Legislature. Otherwise, the failure of a corporation to comply with a condition subsequent, imposed by its charter, is merely a cause of forfeiture in appropriate proceedings on behalf of the state brought directly for that purpose, and can not be set up collaterally by private individuals, other corporations, or by the state.

It certainly can not be contended that the language of the charter of the Covington Electric Light Company exhibited a clear intention upon the part of the Legislature that a non-user should *ipso facto* produce a forfeiture. The word "for-

feiture" implies a legal process, and wherever it has been used alone, either in the form of a verb or a noun, it has been regarded as referring to judicial proceedings or their result, and not to the automatic cessation of the right or rights of the corporation. It may be useful in this connection to call the attention of the court to the various cases in which this question has arisen, where the report of the case shows the language of the charter construed by the court.

In the case of

Lumber Co. v. *Ward*, 30 W. Va., 43,

the language of the act was "shall forfeit its charter." The court held that this language was not self executing.

In the case of

Vermont, etc., Ry. v. *Vermont Ry.*, 34 Ver., 1, pp. 55-57,

the language of the charter was, "This corporation shall cease and this act be void." The court held that this language was not self-executing; and in so deciding said the following:

> "A forfeiture of a corporation can only be taken in behalf of the public and in some form of proceedings to which the public by proper representation is the party moving it, and in which, by competent authority, such forfeiture is declared."

In the case of

The City Council v. *Railway Co.*, 51 S. Car., 129,

the language was, "All rights, powers, franchises and immunities shall cease, determine and be void." The court held that this language was not self executing.

In re Manhattan Co., 9 Wendell, 349,

the language of the charter was, "In default whereof said corporation shall be dissolved." This was held not self executing.

In the case of

In re Kings County Elevated Ry., 105 N. Y., pp. 97-119,

the grant provided for "the release and forfeiture of all rights," etc. The court held this not to be self executing.

In the case of

Day v. *Railway*, 107 N. Y., 129, 139,

the language of the charter was, "Said corporation shall be dissolved." The language was held to be not self executing.

In the case of

The Brooklyn Elevated Railway Co., 125 N. Y., 434,

the language of the charter was, "On default, shall forfeit the rights acquired by it." This was held not self executing.

In the case of

New York & Long Island Bridge Co. v. *Smith*, 148 N. Y., 540,

the language of the charter was, "shall be null and void." The court held this language to be not self executing.

In the case of

Enfield Toll Bridge Co. v. *Conn. Ry. Co.*, 7 Conn., 28, 51,

the language of the charter was "null and void," just as in the preceding case. This was held not self executing.

In the case of

Attorney-General v. *Superior, etc., Ry.*, 93 Wis., 604,

the language of the charter was, "shall be deemed to have surrendered" and "shall be adjudged to be dissolved." This language was held not self executing.

In the case of

Foster v. *Joliet*, 27 Fed., 899,

the language of the charter was "shall cease and determine." This was held not self executing.

In the case of

Briggs v. *Cape Cod Canal Co.*, 137 Mass., 71,

the language of the charter was, "this corporation shall thereupon cease to exist." The court held this language to be not self executing, and in so deciding said as follows:

> "It is too well settled to admit of discussion that a corporation can be judicially determined to have ceased to exist only in a suit in which the commonwealth is a party. The act of incorporation is a contract between the commonwealth and the corporation. Whether

the corporation has complied with the conditions is a question of fact to be judicially determined. The commonwealth may waive a strict compliance, etc."

In the case of

Willamette Falls Co. v. *Kittredge,* Fed. Case No. 17105,

the language of the charter was, "corporate powers shall cease." This language was held to be not self executing.

In the case of

State v. *New Hampshire Turnpike Co.,* 15 New Hamp., 162,

the language of the charter is, "under forfeiture of the privilege, etc." This was held to be not self executing.

In the case of

People v. *Los Angeles Ry. Co.,* 91 Cal., 338,

the language of the charter was, "A failure to comply with these provisions *works a forfeiture.*" This was held to be not self executing.

In the case of

Lessee of Frost v. *Frostburg Co.,* 24 How., 278,

the language of the charter was "shall cease and determine," and this court held this language to be not self executing.

II.

The fact that the bond was not given does not affect the franchise of complainant.

It is claimed by the City of Covington that the failure of the Covington Electric Light Company to give a bond under the Covington ordinance of June 21, 1883, is in some way fatal to the franchise which is asserted in this action. We can not understand the basis of such a contention. No authorities have been cited, showing a decision by any court that a valid franchise, granted by the state, may become forfeited by the mere failure of the grantee to give a bond required by municipal authorities.

The act incorporating the Covington Electric Light Company, and granting it the franchise in question, did not require

the company to give a bond. Such a requirement was not a part of the contract between the company and the state, and was not a condition precedent, or a condition subsequent, to the vesting of the rights given by the act of incorporation.

Neither was the City of Covington empowered in said act in express terms to require from the Covington Electric Light Company a twenty thousand dollar bond, or any bond.

The sixth section of the act of incorporation is the only section containing any language which apparently gives any control to the City of Covington, and is as follows:

> "Said company shall have the privilege, *subject to the regulations of the city authorities*, to lay its pipes and mains, to erect its poles, posts and wires, through and along any street or highway in the city aforesaid, or adjacent thereto, as it may see fit; provided, it in no way permanently obstructs the use of the same to the public or any individual; and it is hereby required to place and put in repair any street or highway through which its line of pipes, wires, etc., may pass; but it is allowed to temporarily obstruct for a reasonable time in laying its line and repairing the same."

The only language in the act of incorporation, therefore, giving any power to the City of Covington, is the language, "subject to the regulations of the city authorities;" and this regulation refers to the manner of the exercise by the company of its privilege to lay pipes and mains, erect poles, posts, etc., on the streets or highways of the city.

On October 5, 1882, less than six months after the granting of the franchise, the City of Covington passed an ordinance "to enable" the Covington Electric Light Company to exercise the franchises granted by the act of the General Assembly. This ordinance contained no requirement for the giving of a bond. The ordinance remained in force until it was repealed by the general ordinance of June 21, 1883. This latter ordinance, which is printed with this brief as "Appendix C," purported to give to any incorporated company, firm or individual, the franchise to enter in and upon the streets and public places of the City of Covington, and erect poles and string wires for the purpose of furnishing the city and its inhabitants with electric light. It did not purport to state the regulations under which the Covington Electric Light Company might exercise the

franchise granted by the state. It provided for the granting of franchises by the city, and, as we claim, had no relation whatever to any pre-existing franchises granted by the state itself. Among its provisions was section 8, which provided for the giving of a bond. Said section is as follows:

> "Whenever any incorporated company, firm or individual, shall wish to operate *under the provisions of this ordinance*, it, or they, shall make a written application to the city council, *stating their desire to operate under this ordinance, and the time for which they desire to operate, not exceeding twenty-five years;* and shall accompany said written application by a bond in the penal sum of twenty thousand dollars, with good and sufficient security, conditioned to keep and perform all the terms and conditions of this ordinance, and to comply with all the rules and regulations herein provided, and to save the city harmless from all loss, costs, damages, fees and expenses, of every kind, the said city may sustain or be put to, in any manner, *by reason of the grant of the privileges herein provided for*, or by reason of the failure of said incorporated company to comply with the terms, provisions, conditions, stipulations and regulations of this ordinance, or any one or more of them, and, if the said council are then satisfied that permission shall be granted to said incorporated company, firm or individual, and if the bond presented shall be satisfactory to said council, the said council shall approve said bond, and shall, by ordinance or resolution, *grant permission to said applicant to operate under the provisions of this ordinance.*"

The ordinance of June 21, 1883, was amended July 3, 1884, section 2 of the amended ordinance being as follows:

> "2. The bond to be given by any such company, firm or individual shall be in the sum of $20,000, as provided in said original ordinance, to which this is an amendment, and in addition to these conditions, stipulations and provisions to be contained in said bond, as provided in said original ordinance, the said bond shall contain the further conditions that the said company, firm or individual accepting the provisions of said ordinance as now amended, shall restore to their former conditions and put in repair at his or their expense any streets, alleys, avenues, highways, public grounds or squares that may be taken up, excavated or obstructed, in any way, by the laying of said pipes, mains

or other conduits under said streets, alleys, avenues, etc., and that it will pay to the city all damages, costs or expenses said city may sustain, incur or be compelled to pay by reason of taking up, excavating or obstructing any such streets, alleys, avenues, highways, etc., in the laying of said pipes, mains or conduits."

We have thus given a brief statement of the provisions of the act, and of the various ordinances under which the city is now claiming a forfeiture of our franchise, as a result of our failure to give bond. We think this contention of the city is unfounded for the following reasons:

1. The act of incorporation of the Covington Electric Light Company did not provide for any *permission* or *consent* to be given by the City of Covington; the state gave to the company the permission and the consent to enter in and upon the streets of Covington, and the City of Covington had not the power to deny or prevent the exercise of the right, or to abridge its exercise. Furthermore, the franchise of the Covington Electric Light Company was not by virtue of any grant or permission or consent of the City of Covington, no matter what action the city might take. The right of the company proceeded from the state by a legislative charter, and became vested in the company irrespective of any action which the city might take.

The only power which the city had was to regulate the manner of using the streets for the location of pipes, poles, wires, etc. We doubt very much whether the city had the power, under the act of the General Assembly, to require a bond of the Covington Electric Light Company, even if it had done so. The terms of the franchise itself provided the extent to which the company might obstruct the streets, and it stated the requirement as to placing and putting in repair any street or highway. That subject having been covered by the act of incorporation, we think it is clear that the City of Covington had no power to impose any different or additional restrictions upon the exercise of the right, and had no power to require from the company the giving of a bond to secure the performance of the conditions of either the legislative act itself or of any ordinance passed by the City of Covington.

2. The City of Covington did pass an ordinance setting forth the regulations under which the Covington Electric Light

Company could exercise its franchise. It is to be borne in mind that such action upon the part of the City of Covington was not a condition precedent to the vesting of the franchise rights. The act did not provide for any consent or permission to be given by the City of Covington, but only for the imposition of reasonable regulations by the City of Covington. If, therefore, the City of Covington failed to impose regulations on this company, or if, having imposed any such regulations, it rescinded or withdrew them, the company was not thereby deprived of its right to go on the streets of the City of Covington. If the city imposed no regulations, or withdrew any which it had imposed, the company was free to act untrammeled by any regulations, except those contained in the articles of incorporation.

The ordinance which was passed by the city on October 5, 1882, contained no provision requiring the company to give a bond. The only regulations that it imposed were with reference to the obstruction of the streets and their repair. This ordinance was never amended so as to include a provision with reference to a bond. The ordinance was repealed on June 21, 1883, by another ordinance, which did not refer to or include the franchise of the Covington Electric Light Company, and did not purport to state any regulations under which its franchise should be exercised.

We submit, therefore, that the only regulations which the City of Covington ever imposed upon the Covington Electric Light Company were repealed, and these regulations did not include a requirement for bond. The company was, therefore, left untrammeled and unrestricted, save by the terms of the legislative act creating it, in its exercise of the power to go upon the streets of Covington. The City of Covington did recognize its rights, and did impose certain regulations, which were afterwards repealed, but the city had, by the ordinance of October 5th, recognized the franchise of the Covington Electric Light Company, and it could not, by a repeal of the ordinance in question, deprive the company of the right to go upon the streets of Covington. That right upon the part of the company did not require the consent of the City of Covington; but, if it had, the city could not have withdrawn the consent, when once given. (See *Africa* v. *The Mayor and Councilmen*, 70 Federal, 739.)

3. As we have seen, the ordinance of June 21, 1883, with its amendment, did not recognize or purport to regulate the Covington Electric Company. It was an attempt upon the part of the City of Covington to grant franchises, and not to regulate the exercise of any franchise which had been granted by the state. The requirements contained in that ordinance were expressly prescribed for companies exercising a privilege *granted by that ordinance*, and could not be held to apply to the exercise of a privilege which was not granted by that ordinance, but which was granted by an act of the General Assembly of the State of Kentucky. We claim, therefore, that there never was in existence any ordinance of the City of Covington, requiring the Covington Electric Light Company to give a bond.

If, however, the ordinance of June 21, 1883, could be construed to impose requirements upon the Covington Electric Light Company by its terms, then we claim that said ordinance was invalid and contrary to law, and not binding upon the Covington Electric Light Company. That company had received an exclusive franchise from the state by a law which provided that it should have for a period of twenty-five years the exclusive privilege of carrying on the business of furnishing electric light to the city and its inhabitants. The effect of such a law was to prohibit the City of Covington from granting such a franchise to any other company, and the City of Covington was not only without power to pass the ordinance of June 21, 1883, but in passing that ordinance it was defying a direct prohibition of the law of Kentucky. Section 8 of that ordinance provided for the granting of such a right to any company, firm or individual, and required any such company, firm or individual to give a bond. In other words, section 8, as well as the remainder of the ordinance, provided for the granting of franchises inconsistent with the act of April 22, 1882, was a violation of said act, and was void in toto.

Being a void ordinance, and in violation of an act of the General Assembly prohibiting such action on the part of the City of Covington, none of its provisions was binding upon the Covington Electric Light Company, even if they could be construed to apply by their terms to that company.

4. Even if the City of Covington had imposed upon the Covington Electric Light Company a valid requirement to give a bond, as one of the regulations which the city had a right

to impose, and even if we assume that the city had the right to impose such regulations, nevertheless the failure of the company to give such bond can not now be asserted as having brought about an automatic forfeiture, or as being even a ground of forfeiture.

It is to be borne in mind here that the consent of the city, or obedience to its regulations, was not a condition precedent upon which the vesting of the franchise depended. It can not be claimed, therefore, that the failure to give bond could in any event have prevented the vesting of the franchise. The giving of such a bond, if a valid requirement, and one which could affect the franchise at all, was merely a condition subsequent, and the failure to give bond could not, therefore, produce an automatic forfeiture. Whatever remedy the city might have had in the event of a refusal by the company to give bond in spite of the city's requirements that it should do so, the city certainly has not the right, after the company has been in possession, with its acquiescence, for ten years, to claim that a failure to give bond produced an automatic forfeiture or destruction of the franchise.

Upon this point we again call the attention of the court to the reasons and authorities which have been cited on the preceding pages of this brief as to the effect of the non-compliance with the conditions subsequent, and to repeat and make special application to the principle there set forth, it seems clear that the failure on the part of the company to give a bond, even if there were a valid requirement of that sort, could not be treated as having *ex proprio vigore* produced a forfeiture or destruction of the franchise.

5. The final reason why the city's point in this regard is not well taken is, that the city itself waived the giving of the bond by implication and expression. The company commenced using the streets and public places of the City of Covington in the transaction of its business under its franchise in January, 1891. The city is charged with notice of that fact, and the evidence of this case shows that it had notice, and from that date until some time in the latter part of 1897, no objection or comment was made by the city or any of its officers to the carrying on of an electric light business in the City of Covington, without having given a bond.

In 1897, the city desired to make a contract with the company to light the streets of the city with electricity. Before entering into such contract, the city council passed a resolution referring to a committee of council the question of whether or not the company had a valid franchise on the streets of Covington. To this committee was added the city solicitor. The committee and the solicitor made a report, finding expressly that for valid reasons the company was not required to give a bond, and that, in spite of the failure to give the bond, the company had upon the streets of Covington at that time, in 1897, a valid franchise, with all the rights granted to it by its act of incorporation in 1882. This report is appended to this brief (see Appendix E). In this report council concurred unanimously, and upon the basis of that report the City of Covington entered into a contract with the company, by which the company undertook to light the streets with electric lights. Since that time the company has been furnishing electric light to the city, under that contract or some successor to it, and it has been paying the company's bills, not regularly, we regret to say, but without objection on the score of the company's franchise, and with sufficient regularity to constitute an estoppel as against the city.

Furthermore, the evidence in this case shows that the city has been for years collecting a franchise tax from that company upon this particular franchise, and that the company has been regularly paying that franchise tax.

We claim, therefore, that whatever may have been the legal obligation of the company in giving the bond, or whatever may have been the legal effect of its failure to do so, the city has, as a matter of fact, waived the giving of the bond, and that its absence can not now be set up as a defense of this action.

III.

The consolidation of the Covington Electric Light Company with the other companies under the name of the Suburban Electric Company carried to the new company this exclusive franchise.

It is claimed that in some way this company lost through consolidation its exclusive franchise in the City of Covington. We fail to see any ground for this contention. Section 555

of the Revised Statutes of Kentucky provides how the consolidation shall be effected, and Section 556, relating to the rights and liabilities of a consolidated corporation, is as follows:

> "When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the separate existence of the constituent corporations shall cease, and the consolidated corporations shall become a single corporation, in accordance with the said agreement, and subject to all the provisions of this chapter and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer and shall be bound for all their contracts and liabilities."

We fail to see how there could be any claim made under this statute that the consolidated company did not take the exclusive franchise of the Covington Electric Light Company. It must be admitted that the franchise of the Covington Electric Light Company was by its terms assignable, and the Covington Electric Light Company sold or disposed of that franchise to some one else. In other words, the franchise was property; it was an asset of the company; and under the terms of the statute above quoted, that property right passed to the new company.

2 Clark & Marshall on Private Corporations, Section 355*a*, contains the following pertinent language, sustained by authority:

> "If there is no provision to the contrary in the statute or the agreement between the parties, the general rule, based upon the presumed intention of the Legislature and the corporations, is that the consolidated corporation acquires by the consolidation all the rights, franchises, privileges and property of the consolidating corporations, subject to the same burdens and restrictions which attached thereto in the hands of the consolidating corporations, respectively, under their charters."

In the case of the *Philadelphia and Wilmington Railroad Company* v. *Maryland*, 10 Howard, 376, the decision of the Chief-Justice contains the following language:

> "And the law which authorizes these two companies to unite themselves with the plaintiff in error,

declares that this new corporation, that is, the Philadelphia, Wilmington and Baltimore Railroad Company, shall be entitled within this state to all the powers and privileges and advantages at that time belonging to these two companies. It grants it nothing more.

"Now, as these companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place, and possess the power, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. And this intention is made still more evident by the fourth section of the law, which makes the new corporation responsible for the contracts, debts, obligations, engagements, and liabilities at law or in equity of the several companies, and declares that it shall hold and be entitled to all the estate, real, personal, and mixed, choses in action, etc., belonging to or due to the several companies."

See also to the same effect the *New Orleans Gas Company* v. *The Louisiana Light Company*, 115 U. S., 650.

It can not be questioned, therefore, that on the face of the statue, and in view of the nature of the consolidation which was effected in the case at bar, the consolidated company acquired from the Covington Electric Company this exclusive franchise, with all of the attributes and liabilities attaching thereto, immediately prior to the consolidation, in the hands of the Covington Electric Light Company.

It is claimed, however, that in some way the Covington Electric Light Company and the Suburban Electric Company became subjected to the provisions of the new constitution by virtue of the consolidation, and that under the new constitution this exclusive franchise could not exist, and was therefore relinquished by the consolidation.

We think that this position is untenable. In the first place, no intention appearing to subject its charter to the provisions of the new constitution, it does not follow that the Covington Electric Light Company, by entering into the consolidation subjected itself to that instrument to any greater extent than it had been before.

Citizens' Street Railway Company v. *Memphis*, 53 Federal, 713.

In the second place, even if the agreement of consolidation subjected this company to the new constitution, there is nothing in that instrumnt which destroys or affects this exclusive franchise; on the contrary, its existence and validity are specifically recognized. Section 191 of the present Constitution of Kentucky is as follows:

> "All existing charters or grants of special or exclusive privileges under which a *bona fide* organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this constitution, shall thereafter be void and of no effect."

This section provides for the forfeiture of all charters and grants of special or exclusive privileges under which an organization shall not have taken place, and business not been commenced at the time of the adoption of the Constitution, and it just as clearly and definitely means that all existing charters and grants of special or exclusive privileges under which a *bona fide* organization *shall have taken place*, and *business have been commenced*, shall be valid, and shall continue to exist under the sanction and approval of the new constitution. This proposition is too plain for argument.

The Covington Electric Light Company had a *bona fide* organization for several years prior to the adoption of the constitution, and it had commenced business in good faith prior to the adoption of the constitution, so that it is entitled to the benefit of the principle just laid down.

As the constitution expressly recognizes, therefore, the validity of a charter or a grant of a special or exclusive privilege under which a *bona fide* organization had taken place and business had been commenced, it can not be claimed that there is anything in the new constitution which was inconsistent with the franchise here asserted. Even if, therefore, the consolidation brought this charter under the provisions of the new constitution, that did not invalidate or curtail in the slightest degree the franchise in question, because that franchise is directly and explicitly recognized by the new constitution. But we are referred to Section 3 of the Bill of Rights, which contains the following language:

> "And no grant of exclusive separate public emoluments or privileges shall be made to any man, or set of men, except in consideration of public services."

It is claimed that this language would forbid the grant of an exclusive franchise, and that, therefore, the consolidation, by bringing the corporation under the provisions of the new Constitution, invalidated the exclusive franchise in question.

This question has been passed upon by this Court clearly and directly. The language in question does not forbid the granting of an exclusive gas or electric franchise, because such a grant is made in consideration of a public service, and is therefore valid. In the case of the *Louisville Gas Company* v. *The Citizens Gas Company*, 115 U. S., 683, the third paragraph of the syllabus is as follows:

> "A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants by means of pipes and mains laid through the public streets, and upon condition of the performance of the service by the grantee, is no infringement of that clause in the Bill of Rights of Kentucky, which declares 'that all freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services.'"

In a case heretofore referred to, viz., the case of the *New Orleans Gas Company* v. *The Louisville Light Company*, the same rule is laid down.

See also, to the same effect, *The New Orleans Water Works Company* v. *Rivers*, 115 U. S., 674.

In the light of the authorities quoted, we think it is perfectly clear that the consolidation carried to the new company franchises of the old company in their entirety, and that, even if it can be claimed that by the act of consolidation the corporations embraced the new constitution, and came within its terms, there is nothing in the new constitution which either forbids or terminates an exclusive franchise of the character indicated. On the contrary, the validity of such a franchise is expressly recognized by the constitution itself and by this Court in its interpretation of that instrument.

We can not distinguish the argument used by the court below in rendering its opinion on the question of consolidation from the argument employed on the repealing effect of Section 573, which will be discussed presently in our brief. The court apparently states that the consolidated company acquired all of the property and assets of The Covington Electric Light Company, including the franchise to occupy the streets and conduct the electric light business in the city of Covington. The opinion, however, concludes that the exclusive feature of that franchise was a mere immunity from competition, severable from the franchise itself; that it was appurtenant to the corporate power to carry on the business and not to the franchise to occupy the streets; that these rights came to the new company, not by transfer from the old companies, but by what was, in effect, a new grant from the state, and that consequently the consolidation proceedings did not carry to the new company anything which was not obtainable under the constitution and statutes at the time of the consolidation, and takes as a parallel case an exemption from taxation.

Our answer to this position taken by the lower court is that the exclusive feature of our franchise, no matter how it might be worded, was a property right for which we paid a consideration in the public service which we undertook to render, and under the authority of the cases cited hereafter in the discussion of the effect of Section 573, the exclusive feature is deemed an integral part of the franchise. This being true, it is property, just as much as the franchise itself is property, and it, therefore, passed under the consolidation proceedings just as much as poles, wires, motors or generators passed.

IV.

The franchise was not repealed by the passage of the Covington city charter.

Counsel for the City of Covington lays great stress on the alleged power of repeal possessed by the state by virtue of the act of 1856, and Section 3 of the new Constitution.

The act of 1856, now contained in Section 1987, of the Kentucky Statutes, is as follows:

> "All charters and grants of or to corporations, or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to repeal at the will of the General Assembly, unless a contrary intent be therein plainly expressed; provided, that whilst privileges and franchises so granted may be repealed, no repeal shall impair other rights previously vested."

We do not deny, therefore, that the General Assembly of the State of Kentucky had the power of amendment or repeal set forth in the foregoing statute, but we do claim:

First. That the power of repeal is not itself equivalent to a repeal.

Second. That the power of repeal does not include the power to destroy our rights upon the streets of Covington after they once vested.

Third. Whatever power the State of Kentucky had, it has never directly or indirectly altered, amended or repealed the charter and franchise which we assert in this case.

1. With reference to the first proposition, we think that there is some confusion in the mind of the counsel for the City of Covington as to the effect of a reserved power of repeal. He contends that by virtue of the act of 1856, the State of Kentucky reserved the power to amend, alter or repeal the charter of the Covington Electric Company, especially in view of the fact that said charter does not contain any language which negatives such a reservation. With this contention we are not disposed at this time to take issue. But counsel for the City of Covington goes on to assume from this principle that when an exclusive privilege is given by a special charter, and that charter does not contain words negativing the right of amendment or repeal, the franchise thereby ceases to be exclusive. In other words, that if the Legislature gives an exclusive franchise in a charter which it reserves the right to repeal, that by virtue of such reservation, the exclusive feature of the franchise is of no avail.

We submit that a mere statement of that proposition furnishes its own contradiction.

It must appear that the General Assembly not only had the power of repeal, but that it did, in fact, repeal by language which is free from any doubt.

2. The power to amend, alter or repeal the charter of the Covington Electric Light Company, if such a power existed, relates to the corporate existence and powers of the corporation, and does not include the right to deprive that corporation or its stockholders of any vested property rights.

The exclusive franchise of the Covington Electric Light Company was a naked privilege until the company took possession under it. When the company entered into possession of the franchise and occupied the streets of the City of Covington in January, 1891, that franchise became a vested property right, and was no more subject to amendment, alteration or destruction by the Legislature than was the plant or other assets of the company.

In the case of *Orr* v. *Bracken County*, 81 Kentucky, page 593, the general principle upon this subject is laid down in the first paragraph of the syllabus, and we cite the case simply as an expression of the general principle, and not with the claim that the case is on all fours with the case at bar. The first syllabus is as follows:

> "Although the right to amend the charter of a private corporation may be expressly reserved, that right does not confer upon the General Assembly the power to take away from the corporators the control of the corporate property."

See also the case of *People* v. *O'Brien*, 111 N. Y., 1.

3. Whatever may have been the power of the state, there is nothing in this record to show, and it is not the fact, that the State of Kentucky ever did repeal, in whole or in part, the charter of the Covington Electric Light Company.

It is claimed that this repeal was accomplished by the city charter of Covington, passed some time in 1894. The specific language relied on is that of Section 3058-6 of the Revised Statutes of Kentucky, which is as follows:

> "The general council shall have power by ordinance . . . to provide by themselves, or through others, for lighting the streets, public places and buildings, and furnishing light to the inhabitants, and to regulate the quality and quantity of the light, and method, time of, and appliances for furnishing the same."

This statute, in fact, the whole act, relates to cities of the second class, and thus applies to Covington, Newport and Lexington. It confers general powers upon those cities, to last for all time until altered by the Legislature, and it very properly gives each one of those cities the power to provide, by themselves or through others, for lighting the streets and furnishing light to the inhabitants. There is nothing, however, in such a power that can be construed as a repeal of an existing exclusive franchise for a limited number of years in any one of the cities named.

The fact that the city is given power to provide "through others" for lighting the streets and furnishing light to the inhabitants, recognizes the validity of an exclusive franchise relating to any one of the cities covered by the statute in question.

Furthermore, the exclusive franchise in question in this case, being for a limited period of time, an act authorizing the City of Covington and other cities to light their own streets, and being properly applicable for an indefinite period of time, is not inconsistent with the exclusive franchise.

We submit, therefore, that there is nothing in the act for the government of cities of the second class which can be construed into an express or implied repeal of the act giving to the Covington Electric Light Company an exclusive franchise upon the streets of Covington. This is very clearly set forth in the case of *The City Railway Company* v. *The Citizens' Railway Company*, 166 U. S., 557. In that case, a street railroad company had a franchise upon the streets of Indianapolis under an act of the Legislature. The city council attempted to give the same franchise to another company before the expiration of the first company's grant, and attempted to act upon the authority of the city charter of Indianapolis, giving to the city entire control of street railway companies within its limits. Upon this point the court says:

> "Did the act of 1891, known as the new charter, repeal the act of 1861, authorizing the incorporation of railway companies? In other words, should it be construed as an exercise of the power, reserved to the state, in the eleventh section of the act of 1861, to amend or repeal that act at the discretion of the Legislature? As the act of 1891 practically established a new system and vested the whole power of the Legislature over street

railway companies in the board of public works of the several cities therein named, subject to the approval of the common council of such cities, perhaps it might be construed to repeal the former, so far as there was a conflict between the two acts; but it certainly should not be construed to act retrospectively, or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction. While it was doubtless intended to authorize the board of public works of the cities covered by the act to contract for the use of their streets by railway companies, there is nothing from which can be inferred a power to disturb or interfere with contracts already existing—indeed, it is highly improbable that it would ever have delegated such a power to a subordinate body."

See also to the same effect the opinion of Mr. Justice Brewer, delivered in the case of *Rodgers* v. *United States*, 185 U. S., 83.

However, if there were any question whether Section 3058-6 was intended as a repeal of any existing franchises held by private corporations, such question would be answered conclusively by Section 3197 of the same act, which is as follows:

> "The repeal of any law by the provisions of this act shall not in any wise be so construed as to affect any *right* or *liability acquired* or *accrued* thereunder, by or on the part of the city, *or any person or body corporate;* and this act shall not in any manner affect any right, lien or liability accrued, established or subsisting under and by virtue of previous charters or amendments thereto or ordinances passed thereunder, but such right, lien or liability shall be enforced and such action or proceeding shall be carried on in all respects as if this act had not taken effect; nor shall this act be in anywise so construed as to affect the right, or liability acquired or accrued under previous charters or amendments thereto or ordinances passed thereunder, on the part of the city or any person or body corporate."

And this language makes perfectly clear the intention of the Legislature to leave unchanged any franchises existing in the various cities covered by the act.

V.

The company's franchise was not repealed by section 573 revised statutes of Kentucky.

Section 573 of the Revised Statutes of Kentucky is as follows:

> "*Charters in conflict with this chapter—Provisions relating to—Penalty.* The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation, which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agent of such corporation shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offense not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation, the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the 28th day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this state, if said provisions would be applicable to them if organized under this chapter."

The portions of the statute relied upon may be separately stated as follows:

> "1. The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly, or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, . . . shall stand repealed on September 28, 1897.
>
> "2. And all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter shall stand repealed on September 28, 1897."

Let us endeavor to determine whether the exclusive franchise in question in this case is repealed by either of the above quoted provisions.

1. Is that franchise a provision of our special charter, which is inconsistent with the provisions of "this chapter concerning similar corporations?" Without undertaking to define the term "provision" of a "charter" at this point, it is sufficient to say that our franchise is not inconsistent with the provisions of the chapter in question concerning similar corporations. The expression "this chapter" relates to Chapter 171 of the General Statutes of Kentucky as enacted on April 5, 1893, and as found in the Laws of 1891-3, on page 612, which is the General Corporation Act and substantially corresponds to Chapter 32 of the Revised Statutes.

It is evident from an examination of the act of April 5, 1893, and from an examination of Chapter 32 of the Revised Statutes, that "this chapter" does not contain anything "concerning similar corporations." There is nothing in said chapter relating to an electric lighting corporation which is incorporated and organized under the general law, and there are no special provisions relating to it. There is nothing, therefore, with which our charter can be inconsistent.

Furthermore, there is nothing in that chapter relating to corporations of any kind, general or particular, which is inconsistent with the exclusive franchise that we claim.

It is unnecessary, therefore, at this point to consider whether the exclusive franchise granted to us by our charter is a "provision" of our charter, within the meaning of Section 573, or whether the word "provision" relates merely to the powers as distinguished from the property rights of the corporation.

2. Is our exclusive franchise covered by the language of Section 573 "all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter?"

We contend most earnestly that this clause applies to such powers, privileges or immunities as can not be classed under the head of property rights, and does not apply to a franchise upon the streets of a city or upon a road, such rights being in

the nature of property and not in the nature of powers, privileges or immunities.

The act of April 5, 1893, being the chapter referred to, did not purport to control or regulate such corporate property rights as a municipal lighting franchise, or a street railway franchise, or anything of that sort. It does not provide any method by which such franchises can be obtained, and makes no reference to a franchise of that character. No lighting franchise, or street railway franchise, or water franchise could be obtained by any company upon any terms "under the provisions of this chapter," and if the claim made by the City of Covington with reference to the effect of Section 573 is a valid claim, then it follows that on September 28, 1897, every gas, electric, street railway, railway and water franchise in the State of Kentucky immediately expired, because no franchise of that character could possibly be obtained by any company under the provisions of the chapter in question. The manner of obtaining such franchises is provided for in other chapters, and the chapter in question only relates to the organization of the corporations; their rights; their liabilities; the rights and liabilities of their stockholders; the powers of their directors and questions of this sort which relate to the inherent powers of the corporation, and it does not purport to relate in any respect to the method by which a corporation may acquire such a property right as an electric franchise.

In the case of *Williams* v. *Nall*, 21 Reporter, 1526, Section 573 was invoked for the purpose of imposing upon the stockholders of a certain corporation a double liability which was not upon them at the time of the organization of the corporation, and this case illustrates the point we have in mind.

Section 547 of the Kentucky Statutes, which is a part of "this chapter," relates to the question of the liability of stockholders, and as the liability of stockholders is one of the questions covered by the chapter we are considering, Section 573 could very well relate to that immunity or privilege.

We conclude, and we think it is perfectly clear that Section 573 only relates to such matters as are within the purview of the chapter in question and embraced within its general purpose; viz., matters of the organization and the powers of a corporation; the powers of its officers, and the rights and lia-

bilities of its directors and stockholders, and does not relate to such a property right as an electric franchise.

In the decision of this case, the court below, however, took the position that our exclusive right related, not to the occupancy and use of the city streets, but related, and was appurtenant, to the right to carry on the business. The language of our charter is as follows (See Appendix A):

> "The body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years."

The court, in its opinion, reasoned that the right to carry on an electrical business is a right which can be obtained now under the chapter of which Section 573 is a part, and concluded therefrom that an exclusive right appurtenant to the power to carry on the business was prohibited by Section 573, although that exclusive right would not be so prohibited if it had applied merely to the occupancy of the streets of the city for the purpose in question.

But we claim that the exclusive feature of our charter is an essential and integral part of the franchise acquired by us from the State of Kentucky, in consideration of public service, to be rendered by us; that as such it is a contract right, and is property to the same extent that our right to occupy the streets at all, our poles, wires and plant are property. The fact that the exclusive feature of the contract is stated in that paragraph relating to corporate powers, and not in the paragraph relating to the occupancy of city streets, does not, in our judgment, affect the question. The charter is to be taken together as a whole, and what we own is the thing given to us by the charter, whether it be contained in one or another of the paragraphs of the charter. If we had been given an exclusive right to occupy the streets and public places of the city for the purpose stated, it would have been equivalent to giving us the exclusive power of carrying on that business in that place; on the other hand, if we are given the exclusive power of carrying on the business in that place, it is the equivalent of giving us the exclusive right to occupy the streets and public places for that purpose. The substantial right which we obtained is the test, and not the phraseology or arrangement giving us that right.

Exclusive franchises are granted in various ways. The exclusive feature of a franchise may be expressed as a part of the corporate power, or it may be expressed as a part of the clause authorizing a company to use the streets for the purpose indicated, or it may be expressed simply in the form of a sentence in a charter forbidding other companies to engage in the light business during the time and at the place named. In any event, it is the same; it is an exclusive franchise which, when accepted and acted upon by the company, becomes a contract binding upon both parties; and it becomes the property right of the company just as thoroughly as any contract which it possesses.

In the case of *Bridge Proprietors* v. *Hoboken Company*, 1 Wallace, 116, the exclusive feature of the charter was not attached to either the corporate power or to any easement, but was simply in the form of a prohibitive enactment forbidding others to engage in a like occupation. The court held that it was nevertheless a contract, being an essential part of the entire transaction. (See page 146).

In the case of *The Binghamton Bridge Company*, 3 Wallace, 51, the charter was of the same sort, and with the same phraseology, and on page 68 the argument of counsel calls attention to the fact that the exclusive feature does not appear to be a part of the contract, but is a mere prohibitory enactment. The court, nevertheless, held this to be a contract, and to create a contract or property right. (See pages 74 and 75).

In the case of *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S., 650, the charter was of the same sort as the one in the case at bar. The exclusive rights of the company apparently were appended to the corporate power rather than to the occupancy of the city streets, but this suggested no distinction to the court, as it was held to be a contract right belonging to the company. See page 658, 659, where it was held that in effect the company was acting as the agent of the state in the performance of a public duty, and that the contract right or exclusive privilege which had been given to it was the consideration paid to it for the performance of the public duty.

In the case of *New Orleans Water Works Company* v. *Rivers*, 115 U. S., 674, the court makes very clear that in a charter of this character the exclusive feature attaches not only to the corporate power, but also to the occupancy of the city streets.

The company was given the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi or any other stream or river by means of conduits, etc., and then was given the necessary power (although not expressly exclusive) to use the city streets for the purpose in question. The owner of the St. Charles Hotel obtained from the city the power to lay a pipe from the river to his hotel on the city streets, and not for purpose of carrying on business or to compete with the company owning the franchise; but the court held that the exclusive feature of the company's charter would be violated by the grant to Rivers. The opinion of the Court on page 680 and 681, shows clearly that the charter in that case, which was similar in the respects stated to the charter in this case, gave to the company the exclusive right to use the streets and public places of the city for that purpose.

In the case of *The Louisville Gas Company* v. *Citizens Gas Company*, 115 U. S., 683, the counsel for the new company endeavored to draw a distinction between an exclusive privilege of laying pipes in the streets, and an exclusive privilege to make and sell gas. (See page 688 and 690). But the court held, in spite of that attempted distinction, that the right of the Louisville Company was a contract right and was property.

We call the Court's attention to the dissenting opinion of Judges Lewis and Prior in the case of the *Citizens Gas Light Co.* v. *Louisville Gas Co.*, in the Kentucky Court of Appeals, 81 Kentucky Reports, page 280. The opinion of the majority of the Court was reversed in the Supreme Court in the case last referred to, and the dissenting opinion of the minority in the Court of Appeals is here referred to as indicating the point at issue between the majority and the minority of the Court.

See also to the same effect, *Tammany Water Works* v. *New Orleans Water Co.*, 120 U. S., 64.

In the case of *The California State Telegraph Co.* v. *Alta Telegraph Co.*, 22 Cal., 423, the Court said:

> "The grant of a franchise is in the nature of a vested right of property; subject, however, in most cases to the performance of conditions and duties on the part of the grantee. They generally involve important duties of a public character, often onerous upon the grantees. They are necessarily exclusive in their character, otherwise their value would be liable to be

> destroyed or seriously impaired. So long as the grantee fulfills the conditions and performs the duties imposed upon him by the terms of the grant, he has a vested right which can not be taken away or otherwise impaired by the Government any more than other property."

It seems to us clear, upon the authorities quoted, in the first place, that an exclusive franchise is a composite whole, a unit, and that the exclusive feature attaches to, becomes a part of everything necessary to protect a corporation against its violation, and that whatever phraseology may be used to confer it, or to whatever part of the charter it may be appended, it applies not only to the corporate power, but to the franchise to use the streets.

In the second place, as the state enacting such a charter establishes a company as its agent for the purpose of the performance of a public duty, and in consideration thereof makes a contract with it exclusive in its character, it can not afterwards be claimed that the thing which the company gets from the state is a mere power, privilege or immunity. It is a contract, a right, a property right, which is entire, and which should be protected by the courts.

It is not necessary for us to deny, as a part of our argument, that the Legislature may, if a power of repeal be reserved, repeal the exclusive feature without repealing the remainder. This would be in the nature of an alteration rather than a repeal. But what we claim is that, even assuming this power on the part of the Legislature, it was not, as a matter of fact, exercised in the passage of Section 573, because neither the word power, privilege or immunity can be held to be an appropriate or apt description of the exclusive feature of our contract, separate and distinct from the remainder of it.

Such a contract right is not to be classed as an immunity.

In the first place, whether such a grant were made, upon consideration or otherwise, we do not think it can be properly defined as an immunity. In Bouvier's Law Dictionary an immunity is defined as follows:

> "An exemption for serving in an office or performing duties which the law generally requires other citizens to perform."

In Anderson's Law Dictionary it is defined as follows:

"Exemption from a duty, obligation, penalty or service which the law requires of citizens in general."

In Webster's Dictionary it is defined as follows:

"Freedom or exemption from any charge, duty, obligation, office, tax, imposition, penalty or service."

The origin of the word makes its meaning perfectly clear. The Latin word *immunitas* means free from a public service, being derived from the prefix *im*, meaning *not*, and *minus*, which means service or duty.

Immunity, therefore, used as a legal expression, means the exemption of a person or corporation from the performance of some duty or obligation.

It is not every freedom from something which may be properly definable as an immunity. Health is freedom from disease, but you would not properly define health as being an immunity. Wealth results in freedom from poverty, but wealth could not be defined as an immunity. A thing can not be properly defined as an immunity unless it be an exemption from the performance of some affirmative duty otherwise resting upon the person in question. We think, therefore, that to describe an exclusive privilege as being an immunity, on the theory that it exempts one from competition, is an improper and an erroneous use of the word immunity.

We have not been able to find any case in which an exclusive franchise is described as an immunity from competition, or from anything else.

The case of *Williams* v. *Nall*, 21 Ky. L. R., 1526, involves a typical immunity or privilege. It was a right given to the corporation to exempt its stockholders from liability for corporate debts, a liability which is imposed by the very chapter of which Section 573 is a part.

Neither can the exclusive feature of our contract with the City of Covington be separated from the balance of the contract and described as a privilege or a power. A privilege is a permission to do something, or it may be an immunity from a public duty. If the Legislature had intended to include the exclusive feature of such a contract as the one in question, it would have described it as an exclusive privilege or a special

privilege, or an exclusive contract, or some other apt and precise definition. It might have been called a monopoly, or a dozen other expressions might have been applied to it which would be more appropriate than the word "privilege."

If the word "privilege" is to be used at all as applicable to a subject matter of this character, it would include as well the franchise itself as the exclusive feature thereof. This, we think, would show the plain inapplicability of the word to the subject matter, as it would then be getting into a realm which is entirely outside of the purview of the chapter in which Section 573 occurs.

Where, as in the case at bar, a corporation has a clear and unambiguous franchise undeniably exclusive in its character, the courts require the clearest evidence of an intent to repeal it, and this is especially true with reference to the effect of a general law. We do not know of a case in which a law so general in terms as the one in question in this case has been held to be a repeal of a specific contract right in the charter of a company. In Clarke & Marshall on Corporations, the following language appears:

> "Even when the Legislature has reserved the power to repeal the charter of a corporation, a subsequent statute will not be construed as repealing it, unless such an intent on the part of the Legislature is expressed in the statute or necessarily implied. Repeals are not favored, and such a construction should be placed upon statutes, when possible, as to avoid a repeal."

See also *The City Railway Co.* v. *Citizens Railroad Co.*, 166 U. S., 557-564.
Rodgers v. *U. S.*, 185 U. S., 83.
Binghamton Bridge, 3 Wallace, p. 75.

Considered as a property right, we do not think that it is inconsistent with the general law of Kentucky relating to corporations of like character. An exclusive franchise to furnish electric light to the City of Covington and its inhabitants, is a right which could be obtained under the present statutes. True, it could not be obtained under the chapter of which Section 573 is a part, but neither could any franchise be obtained under that chapter, and for that reason we do not think that Section 573 applies to rights of that description. But cer-

tainly if the purpose of Section 573 was to produce uniformity, and merely to produce uniformity, in the laws relating to corporations, it could not be held to be a repeal and extinguishment of a right which, as a matter of fact, could now be obtained under general laws. The Constitution permits exclusive franchises in consideration of public service. There is nothing in the Statutes which forbids them, and the charter of the city contains the express language that none of the powers therein given to the city shall be so construed as to destroy any right acquired under any law theretofore passed. (See Section 3197). These provisions of the Constitution and of the statutes seem to us to indicate that Section 573 was not intended to destroy any exclusive franchise which, in consideration of public service and the performance of a public duty delegated by the state, had been lawfully granted to and enjoyed by a private corporation.

Section 3 of the Kentucky Constitution recognizes the validity and desirability of exclusive franchises of the character in question, and Section 191 of the Constitution preserves in force and effect all such exclusive franchises under which corporations have commenced to transact business.

We think, therefore, that such an exclusive contract is not out of harmony with the existing laws of the Constitution of the State of Kentucky.

Under Sections 163 and 164 of the Constitution, and under the Covington charter, we think it is perfectly clear that the City of Covington, acting on behalf of the state as its constitutional agent for that purpose, would have the power to grant to a corporation the exclusive right to furnish electric light to the City of Covington and its inhabitants, using the streets and public places for that purpose. Under the chapter of which Section 573 is a part, a company could acquire the corporate power to exercise such a franchise, so that whether the exclusive feature be attached to the corporate power to be exercised in the City of Covington, or whether it be attached to the privilege of using the streets and public places in the City of Covington, we think it clear that Section 573 does not repeal the same. We could get under the present Constitution and laws substantially what we have under this charter, viz., an exclusive right to furnish the City of Covington alone, or the City of Coving-

ton and its inhabitants, with electric light, using the streets and public places for that purpose, and we think it was clearly not within the purpose of Section 573 to repeal or to modify the charter, so as to destroy a vested contract right of that character.

If we are right in our contention that the exclusive franchise of the Covington Electric Company was a contract right, and is property, and further, that it is something which in substance could be obtained under present laws relating to the subject matter, that it would follow that consolidation passed it on to The Suburban Electric Company, and the arguments heretofore made apply thereto.

CONCLUSION.

We desire to say in conclusion that for ten years prior to the bringing of this suit, the City of Covington has treated the franchise of the appellant as a valid and subsisting contract right; upon the faith of this the appellant had expended large sums of money in the development of its plant and the perfecting of its system. It is too late now for the city to ignore the rights of the company, and to violate with impunity the terms and spirit of the franchise granted by the Legislature of Kentucky. That franchise, as we think we have shown, is valid and in full force and effect, and the court has the power to protect it against the unlawful acts of the City of Covington.

All of which is respectfully submitted.

MILLER OUTCALT,
RICHARD P. ERNST,
ALFRED C. CASSATT,
Attorneys for Appellants.

APPENDIX A.

AN ACT TO INCORPORATE THE COVINGTON ELECTRIC LIGHT COMPANY.

Section 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That Horace W. Woodruff, William B. Moore, Jr., William H. Glore, and their associates, successors and assigns, shall be, and they are hereby created, a body politic and corporate by the name of the Covington Electric Light Company, with power, and in that name, to contract and be contracted with, to sue and be sued, to plead and be impleaded; to answer and defend in all courts and places whatsoever as a natural person, and to have and to use a common seal and to change, renew or alter the same at pleasure; to ordain and put in execution such by-laws, rules and regulations for the government of its affairs, as it may deem expedient and proper, and the same may be altered or amended at any regular or call meeting by a majority vote of the *paid-up*, after a motion to that end shall have been entered at any regular or call meeting held not less than thirty days before; provided, however, that said by-laws, rules and regulations shall not be inconsistent with the Constitution of this state and of the United States.

Sec. 2. The capital stock of said company shall be fixed by the corporation aforesaid, but shall not exceed one hundred and fifty thousand dollars divided into shares of one hundred dollars each. When the sum of five thousand dollars is subscribed and paid up said company shall have authority to organize and commence business. The share of said stock shall be transferable on the books of the company according to the by-laws, but the company shall hold a lien upon the shares of any stockholder who may be indebted to it, and such shares shall not be transferable without the consent of the president and directors, until said debt shall have been paid or discharged. Each share shall entitle the holder to one vote in person or by written proxy in all elections of officers and at any and all meetings of said company for any purpose.

Sec. 3. The said company shall have the right, and its directors, to take from its officers or agents bonds for the faithful discharge of duty, and for the safety and security of its funds and property.

Sec. 4. There shall be elected at each annual meeting of the stockholders a president, vice-president and treasurer, and five directors, and this number of directors may, by a vote, as hereinbefore provided, be increased to nine, and shall hold their office for one year, and until their successors are elected. A majority of the same shall constitute a quorum for the transaction of business. Vacancies that may occur in the term of any director or other officer may be filled by the board. The annual election, after the first one, which may take place at any time after organization, shall be held at the office of the company in the City of Covington on the second Monday of January of each year. At all meetings of the directors, they shall vote in person and not by proxy.

Sec. 5. That the business of said company is limited to furnishing and supplying the City of Covington, and its inhabitants and persons and corporations located near said city, with ligh and motive power generated by electricity, steam or other artificial means, or of furnishing or supplying either said light, power or heat, and may charge therefor such price and compensation as may be agreed upon between the said company and the individual or corporation contracting with it, and in aid of its object, it may acquire and hold such real estate as may be necessary for the location of its works and carrying into effect the purposes of its organization, and the body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years, but a non-user of the privilege of this act of incorporation for five years shall work a forfeiture.

Sec. 6. Said company shall have the privilege, subject to the regulations of the city authorities, to lay its pipes and mains, and erecting its poles, posts and wires through and along any street or highway in the city aforesaid or adjacent thereto as it may deem fit; provided, it in no way permanently obstructs the use of the same to the public or individual, and it is hereby required to place and put in repair any roadway, street or high-

way through which its lines of pipes, wires, etc., may pass, but it is allowed to temporarily obstruct for a reasonable time any street in laying its lines and repairing the same.

Sec. 7. The private property of stockholders shall not be liable for the debts of the corporation.

Sec. 8. This act shall take effect from its passage.

Passed April 22, 1882.

AN ACT TO AMEND AN ACT, ENTITLED "AN ACT TO INCORPORATE THE COVINGTON ELECTRIC LIGHT COMPANY."

Sec. 719. (1.) *Be it enacted by the General Assembly of the Comonwealth of Kentucky*, That an act, entitled "An act to incorporate the Covington Electric Light Company," approved April the twenty-second, one thousand eight hundred and eighty-two, be, and the same is hereby, amended by striking out in the fifth line of the second section of said act, as it appears in volume the second of the printed acts of the General Assembly of the Commonwealth of Kentucky, passed at the regular session of the General Assembly which was begun and held in the city of Frankfort on Monday, November twenty-eighth, one thousand eight hundred and eighty-one, the words "and paid up."

Approved May 5th, 1884.

AN ACT TO AMEND THE CHARTER OF THE COVINGTON ELECTRIC LIGHT COMPANY.

Sec. 720. (1.) *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the capital stock of the Covington Electric Light Company may, at any time, be increased by the board of directors to any sum not exceeding one million of dollars.

Approved May 10th, 1884.

APPENDIX B.

AN ORDINANCE TO ENABLE THE COVINGTON ELECTRIC LIGHT COMPANY TO EXERCISE THE FRANCHISES GRANTED BY ACT OF THE GENERAL ASSEMBLY OF KENTUCKY.

Section 1. [Repealed by ordinance of June 21, 1883.] *Be it ordained by the City Council of Covington,* That, for the purpose and with the rights and privileges, and under the restrictions set forth in the act of the General Assembly of Kentucky, approved April 22, 1882, entitled "An act to incorporate the Covington Electric Light Company," the said Covington Electric Light Company is hereby empowered to lay its pipes and mains through and along the streets and alleys of the City of Covington, under the supervision of, and in such reasonable manner as may be prescribed by, the committee of internal improvements of council.

Sec. 2. That the privileges hereby granted extend only to the laying of such pipes and mains as are necessary to supply this city and vicinity with light and heat and motive power, generated by electricity, steam or other artificial means, and shall not be so exercised as to injure or interfere with any sewer, gas pipe, telegraph or telephone pole or wire in said city.

Sec. 3. That the said privilege shall be so exercised as not permanently to obstruct the use of any street or alley, or to injure any public or private property, and is granted only on condition, that within such reasonable time, as shall be prescribed by said committee, the said company shall put in good repair all streets and public places, which may be torn up in the exercise of said privilege.

Sec. 4. This ordinance shall take effect from its passage and shall continue in force for twenty-five years from the 22d of April, 1882, *Provided,* however, that a non-user, for one year, or any abuse of the privilege herein granted, either by injury or obstruction to public or private ways or property, or by failure to replace streets or alleys in good repair, within a reasonable time, shall operate a forfeiture.

Sec. 5. Any or all repairs of streets, alleys, highways or other public property, and any and all removals of obstructions thereon, rendered necessary by the exercise of the privileges herein granted, may be made by the city at the expense of said company, and said privilege shall not be exercised until said company shall have signified its acceptance of the terms of this ordinance.

Passed and approved October 5, 1882. (P. 359.)

APPENDIX C.

AN ORDINANCE PRESCRIBING THE TERMS UPON WHICH STREETS, ALLEYS, AVENUES AND PUBLIC GROUNDS OF THE CITY OF COVINGTON, KENTUCKY, MAY BE USED BY INCORPORATED COMPANIES, FIRMS OR INDIVIDUALS, ENGAGED IN THE BUSINESS OF FURNISHING LIGHT BY MEANS OF ELECTRICITY.

Section 1. *Electrical companies may erect poles. Be it ordained by the City Council of Covington*, That any incorporated company, firm or individual, engaged in the business of furnishing light by means of electricity, may, with the consent of owners or lessees of the abutting property, erect and maintain the necessary number of poles, wires, supports, brackets, masts and such other fixtures as are necessary to the business of furnishing the city and its inhabitants with light by electrical currents, and may erect and maintain all such poles, wires, brackets, supports, masts and other fixtures as may be necessary, within said city, subject, however, to the rules and regulations herein prescribed, and to such other regulations and rules as the city council of Covington may hereafter ordain and prescribe for the protection of the interests of said city and its inhabitants. The aforesaid permission shall not be for a longer period than twenty-five years from the date of the grant of same in any case.

Sec. 2. *How poles should be erected—Under direction of committee on internal improvements and city engineer.* The poles, wires, supports, brackets, masts and such, that may be erected by any such corporation, firm or individual, other fixtures shall be placed and erected under the direction of the committee on internal improvements of the city council and city engineer, and shall be placed so as not to injure the support or the working of the lines of any telegraph or telephone, or other like company, previously erected on any individual or private property, or in any way injure, obstruct or inconvenience any person in his or her rights to the free use of such streets, alleys, avenues, etc., as public highways; nor shall any

pole or other support be so placed as to obstruct or inconvenience any public or private highway or passage way, or so as to injure or obstruct any sewer, water or gas pipe, and unless otherwise directed by the said committee on internal improvements, the said poles shall be placed under and along the sidewalks and within one foot of the curb line, and such brackets may project from the houses and such supports may be attached to the awning frames, and such lights overhang sidewalks as preferred by the adjoining proprietor, and with the consent of the property owners of said premises, all such erections, projections, attachments, and overhanging to be under the direction of the said committee on internal improvements and the city engineer.

Regulations concerning electric lights. Provided, however, That in no case shall the same interfere with the free passage and use of said sidewalk. Said lights may be suspended in mid-air and overhang streets, avenues, alleys and public grounds, but all said lights, as to their erection and suspension, shall be under the control of the said committee on internal improvements and the city engineer, and in no case be allowed to obstruct or interfere with the use of such streets, avenues and alleys as public highways.

Sec. 3. The rights and privileges granted in the preceding sections may be exercised by any such incorporated company, firm or individual, only in compliance with the following rules or regulations, to-wit:

CAPACITY OF FIXTURES.

Weight of arc lights. For arc lights, the conductor must have a weight, per running foot, at least equal to that of the wire (or parallel group of wires) constituting the main circuit of the magnetic regulator of the electric lamps, or of the armature of the machine employed, which ever of them is the largest.

Incandescent lights—Safe carrying capacity. For incandescent lights, whenever a connection is made between a larger and smaller conductor, at the entrance or within a building, some approved automatic device must be introduced in the circuit of the small conductor, whereby it shall be interrupted whenever the current, passing through it, is in excess of its safe carrying capacity. The safe carrying capacity of the wire is

that current which it will convey without becoming painfully warm when grasped in the closed hand.

INSULATION.

Insulation—Carrying electricity into buildings. All wires, machines and lamps to be so mounted and secured as to insure complete and continuous insulation with exception of those part (such as portions of the lamps or machines, for example) where insulation is impossible, and in this case accidental contact with exterior objects must be prevented by appropriate screens or the like. In no case must ground circuits be employed, or any portion of the system be allowed to come into conducting connections with the earth through water or gas pipes or otherwise. Exposed wires must be covered with at least two coatings, one of insulating material next the wire, of a thickness and material approved by the said committee on internal improvements and the city engineer, and another, outside of this, of a material calculated to protect the former from abrasion or other mechanical injury. When there is a possible exposure to water the first or second coating must be impervious to that fluid. Whenever electricity is carried into a building by conductors from an exterior source, a cutout must be provided at a point as near as possible to the entrance to such buildings. The outgoing and returning wires, for arc light, shall enter and leave each building at a point at least one foot from each other.

Wires passing through exterior walls—Special insulating tubes when required. Wires passing through the exterior walls of a building shall be firmly encased in substantial tubes of non-conducting material not liable to absorb moisture, and placed in such a manner as to prevent rain water from entering a building along the wires. In running along walls, wires shall be rigidly attached to the same by non-conducting fastenings (the wires themselves being well insulated), and shall not be hung from the projecting insulators in loose loops. All wires shall be placed at a distance of eight inches for arc lights, and two and a half inches for incandescent lights, from each other and wherever they approach any other wire or other conducting body, capable of furnishing another circuit of ground connections, they must be rigidly secured and separated from the same by some continuous solid non-conductor, such as dry wood, of

at least half an inch thickness. Whenever wires are carried through walls, floors or partitions in buildings they must be surrounded by a special insulating tube of substantial material. All joints in wires must be made in such a manner as to secure a perfect and durable contact, continuous wires (without joints) to be used as far as possible.

GLOBES.

Arc lights must be protected by globes. Arc lights must be protected by glass globes, enclosed at the bottom, to prevent the fall of ignited particles; and, where inflammable materials are present below the lamps, the wire netting must be added to keep the parts of the globe in case of its fracture from or during use. All broken or cracked globes to be at once replaced by perfect globes. In show windows, and places where inflammable articles are near the light, spark arresters shall be placed at the top of the globe.

AUTOMATIC SHUT OR CUT OFF.

Modification or checking of currents. Whenever a current of such high electro motive power is employed, that if concentrated on one lamp of a series, it might endanger the said lamp or its surroundings, then some improved automatic device must be employed, whereby the current shall be modified, interrupted or diverted. Means by which those in charge of the dynamo, electric machine, shall be warned of any excessive flow of current, or means whereby the same will be automatically checked, must in all cases be provided.

SEC. 4. *Must put in new approved devices.* Any corporation, firm or individual, operating under these articles, shall be required to adopt from any device which may be brought into public use, and which is approved and adopted by the board of fire underwriters, for the protection of the users of electric light against injury to person or property.

SEC. 5. *Change of location of lines or wires.* That the location of any such line or place, or the location of any poles, wires, supports, brackets, masts or other fixtures shall be changed by the said company, and at their own expense, to such other location as may be directed by the said committee on internal improvements; and, whenever the best interests of the city and

general public may require other different arrangements by said company using the streets for the purpose of lighting, or other purpose, by means of electrical currents, it shall be the duty of said company, at its own expense, to adopt such arrangements as the city council may prescribe.

Sec. 6. *May require wires to be placed underground.* Any corporation, firm or individual, operating under this ordinance, shall, when directed by the city council, carry all electric wires through underground pipes; and where the light is carried to poles, masts, brackets or other fixtures, the wires shall be conveyed to within six inches of where the light is exposed by such tubes or pipes as they (the city council) may require or designate.

Sec. 7. *Company must repair streets.* Any incorporated company, firm or individual, operating under this ordinance, shall, at their own expense, and in a manner to be approved by the said committee on internal improvements, restore to their former condition any streets, alleys, avenues, or public grounds, or squares, that may be taken up, excavated or obstructed, in any way, by the erection of poles and masts, or the laying of underground pipes; and all such excavating made necessary by the erection of poles or masts, or the laying of underground pipes, shall be made under the supervision of, and subject to the control of, the said committee on internal improvements.

Sec. 8. *Provisions for coming within the operations of this ordinance.* Whenever any incorporated company, firm or individual shall wish to operate under the provisions of this ordinance, it, or they, shall make a written application to the city council, stating their desire to operate under this ordinance, and the time for which they desire to operate, not exceeding twenty-five years; and shall accompany said written application by a bond in the penal sum of twenty thousand dollars, with good and sufficient security, conditioned to keep and perform all the terms and conditions of this ordinance, and to comply with all the rules and regulations herein provided and to save the city harmless from all loss, costs, damages, fees and expenses, of every kind, the said city may sustain or be put to, in any manner, by reason of the grant of the privileges herein provided for, or by reason of the failure of said incorporated company to comply with the terms, provisions, conditions, stipu-

lations and regulations of this ordinance, or any one or more of them, and if the said council are then satisfied that permission shall be granted to said incorporated company, firm or individual, and if the bond presented shall be satisfactory to said council, the said council shall approve said bond and shall by ordinance or resolution, grant permission to said applicant to operate under the provisions of this ordinance.

Sec. 9. *Non-user or abuse of the privileges operates as a forfeiture.* The non-user for one year of the privilege granted, or any abuse of the privileges herein granted, either by injury or obstruction to public or private ways or property, or by failure to replace streets or alleys in good repair within a reasonable time, shall operate as a forfeiture of the privileges, that may be granted hereunder, to any corporation, firm or individual.

Sec. 10. *Repairs may be made by the city at the expense of company.* Any and all repairs of streets, alleys, highways or other public property, and all removal of obstructions thereon, rendered necessary by the exercise of the privileges herein granted, may be made by the city, at the expense of the corporation, firm or individual, exercising the privileges herein granted.

Sec. 11. *Repealing clause.* An ordinance passed by the city council October 5, 1882, entitled, "An ordinance to enable the Covington Electric Light Company to exercise the franchises granted by the act of the General Assembly of Kentucky," is now, and is hereby repealed.

Passed and approved June 21, 1883.

APPENDIX D.

AN ORDINANCE TO AMEND AN ORDINANCE PASSED JUNE 21, 1883, ENTITLED "AN ORDINANCE PRESCRIBING THE TERMS UPON WHICH STREETS, ALLEYS, AVENUES, AND PUBLIC GROUNDS MAY BE USED BY INCORPORATED COMPANIES, FIRMS, OR INDIVIDUALS ENGAGED IN THE BUSINESS OF FURNISHING LIGHT BY MEANS OF ELECTRICITY.

Section 1. *Be it ordained by the City Council of Covington,* That any incorporated company, firm or individual, engaged in business or organized for the purpose of furnishing light by means of electricity, may subject, in all respects, to the provisions, stipulations and conditions of the said ordinance passed by this council June 21, 1883, and entitled an ordinance prescribing the terms upon which streets, alleys, avenues, and public grounds, of the city of Covington, Ky., may be used by incorporated companies, firms or individuals engaged in the business of furnishing light by means of electricity in addition to the modes in said ordinance provided for furnishing light by means of electricity, lay its pipes, mains or other conduits under the streets, alleys, and public highways of the city of Covington for the purpose of carrying on its business.

Sec. 2. *Bond; damages, how paid.* The bond to be given by any such company, firm, or individual, shall be in the sum of ($20,000), as provided in said original ordinance, to which this is an amendment, and in addition to these conditions, stipulations and provisions to be contained in said bond, as provided in said original ordinance, the said bond shall contain the further conditions that the said company, firm or individual accept the provisions of said ordinance as now amended, shall restore to their former conditions and put in repair at his or their expense any streets, alleys, avenues, highways, public grounds, or squares, that may be taken up, excavated or obstructed, in any way, by the laying of said pipes, mains or other conduits under said streets, alleys, avenues, etc., and that it will pay to the city all damages, costs or expenses said city may incur, sustain, or be compelled to pay by reason of taking up, excavat-

ing or obstructing of any of said streets, alleys, avenues, highways, etc., in the laying of said pipes, mains, or conduits.

Sec. 3. *Other property not to be damaged.* Any company, firm, or individual, accepting the provisions of said ordinance as now amended, shall not interfere with or damage in any way, the sewers, gas and water pipes now laid, or that may hereafter be laid, in said city, and the work of laying said pipes, mains, or conduits, under the streets, alleys, public highways, etc., of the said city, by such company, firm, or individual, and the putting of the same in proper repair, as herein provided, by any such company, firm, or individual, shall be done under the supervision, and subject to the direction and approval, of the committee of internal improvements of this council and the city engineer of the city of Covington, Ky.

Sec. 4. This ordinance shall take effect and be in force from and after its passage.

(Q.) Approved July 3, 1884.

APPENDIX E.

COUNCIL RESOLUTION NUMBER 419.

[Report of Committee of December 27, 1897.]

Be it Resolved, That the city solicitor and the law committee be instructed to give their opinion at the next regular meeting by what right the Suburban Electric Company is operating in this city.

Passed November 29, 1897.

December 27, 1897. On motion of Mr. ——————— the rules were suspended for the purpose of offering the following report:

To the General Council, Gentlemen—Your committee on law and the solicitor, to whom was referred C. R. No. 419 Resolution in reference to the authority of the Suburban Electric Company to do business in the City of Covington, respectfully as follows:

On the 22d day of April, 1882, the Legislature of Kentucky passed "An Act to Incorporate the Covington Electric Light Company." Said company to have a capital stock of not to exceed one hundred and fifty thousand dollars. Said company was to have the right to furnish and supply the City of Covington and its inhabitants and persons and corporations located near said city with light and motive power generated by electricity, steam or other artificial means, and to charge such prices as may be agreed upon between the company and the individuals and corporations contracting therefor.

Said company was given the privilege, subject to the regulations of the city authorities, to lay its pipes and mains; erect its poles, wires, etc., along the streets and highways of the City of Covington; provided, it in no way permanently obstructed the use of the same to the public or individual.

On April 9, 1900, the Legislature of Kentucky passed "An Act to Incorporate the Edison Electric Illuminating, Heat and Power Company, of Newport, Kentucky," with a capital stock of not to exceed two hundred thousand dollars. The nature of the business was to erect, operate and maintain a general

system of electric dynamos, and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat, power, and any other purpose that the electric current may be applied to in the City of Newport, and to furnish said city and its inhabitants, and other persons, corporations and municipal corporations, located in or near said city, with light, heat and power by the electric current.

On April 17, 1900, the Legislature of the State of Kentucky passed "An Act to Incorporate The Citizens Electric Light Company." This company has authority to furnish electricity, etc., in Dayton, Campbell County, Kentucky.

On the 11th day of April, 1894, all the above-mentioned companies were consolidated, under the Kentucky statute authorizing consolidation, under the name of The Suburban Electric Company, with a capital stock of two hundred and fifty thousand dollars. Said company retained the rights and privileges granted in each of the above-mentioned charters. The articles of consolidation were filed in the clerk's office in Newport, Kentucky, and with the Secretary of State of Kentucky in Frankfort, Kentucky.

On June 21, 1883, the general council passed an ordinance in reference to the use of streets by corporations furnishing electricity, in which ordinance it was provided that a bond of twenty thousand dollars should be given conditioned that said company should comply with the terms of said ordinance.

It seems that this ordinance was never enforced as to the Covington Electric Company, but inasmuch as the said ordinance has never been re-enacted since the adoption of the present charter, it is at this time void and inoperative.

We are of the opinion that said company has the right to do business in the City of Covington by reason of the above legislative enactments, subject to the regulation of the city authorities, and lay its pipes and mains, erect its poles, etc., along any street in the City of Covington, according to the terms of the legislative enactments of April 22, 1882.

W. H. McLEAN,
JAMES H. GAHAN,
JAMES J. MALONEY,
Committee on Law.
WM. McD. SHAW,
City Solicitor.